No. 222.

Brf. of Adams for Defts

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In the Supreme Court of the United States.

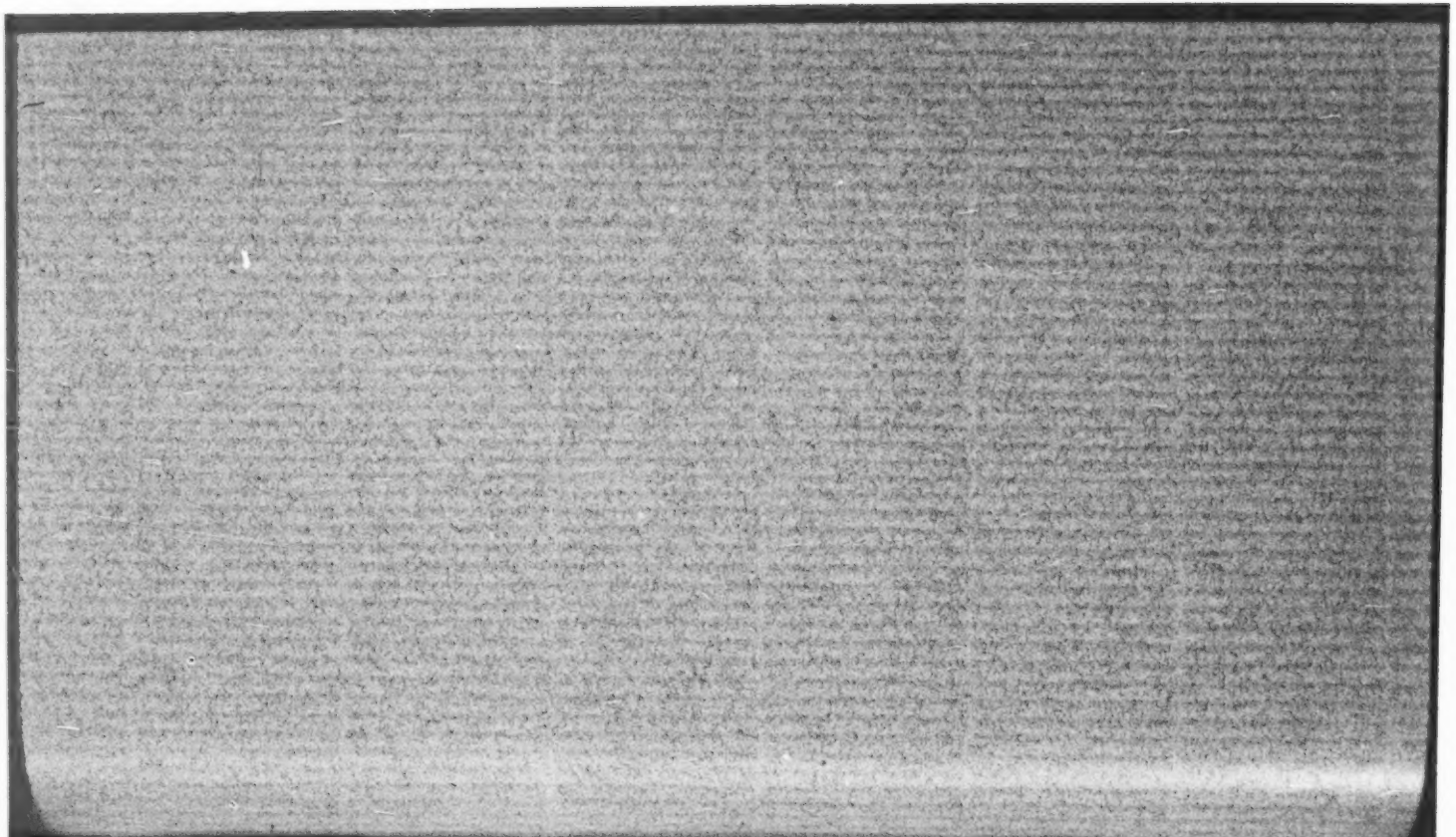
OCTOBER TERM, 1900,

No. 222.

DAVID WELLS, Et Al.,
Plaintiffs in Error,
vs.
THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH, Et. Al.,
Defendants in Error.

Error, from the Supreme Court of Georgia.

BRIEF FOR DEFENDANTS IN ERROR.



In the Supreme Court of the United States.

OCTOBER TERM, 1900.

DAVID WELLS, THOMAS BALLANTYNE, *Et Al.*, *Plaintiffs in Error,* vs. THE MAYOR AND ALDERMEN OF THE CITY OF SAVANNAH, AND WADE, CITY MARSHAL, *Defendants in Error.*	*Error, from the Supreme Court of Georgia; No. 222.*

STATEMENT OF THE CASE.

While the propositions of law, which we will submit, may make unimportant the objections that we have to the statement of the case made by Plaintiffs in Error, we beg to submit them :—

(*a*). There is nothing in the action of Council of May 18, 1790, mentioned on page 26 of the Record, which can be construed into a purpose to exempt from taxation the property referred to after it had been sold on what is commonly called "the ground rent" plan. While the income due to the interest on deferred payments (inaccurately called "ground rent") might "establish a fund for the purpose of meeting the current expenses of the city," at that time very small, this purpose is entirely consistent with the subsequent taxation of this class of property.

(*b*). Plaintiffs in Error undertake to state the substance and legal effect of the contract made with those purchasers who elected to pay a part of the purchase money. We do not concur in the correctness of their statement. The form of the deed used is admitted to be that set forth on pages 19, 20 and 21 of the Record. This deed must speak for itself, and we hereafter submit our contention as to the legal effect of this instrument.

The form of the paper set forth as Exhibit "B" to the answer, on pages 21 et seq., is that appertaining to the leases of the Springfield lots, which are not involved in the case at bar.

The ordinances under which this class of property was sold all agree in form and substance with the original ordinance of September 28, 1790, to be found on pages 28 et seq. of the Record. * It seems to us that this ordinance and the deed are in entire harmony, but, if they are not, the deed, we submit, would control.

While the scheme of the ordinance seems to be that the purchaser who elected to take the property on what was called the ground rent plan was required to pay the increase money over and above the valuation money, or minimum price, in cash, and had the option to retain the original valuation money and pay for its use at the rate of five (5) per cent. per annum, the practice seems to have grown up of permitting a purchaser to pay

* The provision as to a bond was abandoned (Page 3 of Record).

twenty per cent. of his entire bid and hold the balance on this interest, or ground rent. This is indicated by the testimony of Mr. Wylly, put in by Plaintiffs in Error, and to be found on page 57 of the Record. See also ordinance quoted on p. 25 of this Brief and also on p. 7 of Ackley Brief for Plffs in Error.

(c) The advertisement quoted from on Page 3 of the brief for Plaintiffs in Error, and set out on pages 30 and 31 of the Record, is dated some years after the original ordinance and sales thereunder, and is not connected in any way with the property of these plaintiffs. All that appears from the record is that they put in evidence an advertisement from the "Georgia Gazette," contained in its issue of June 13, 1799. It may be inferrable that it referred to some contemplated sale of this class of property, but the property involved in the suit at bar is in no wise connected with this advertisement, and it does not appear that it was the advertisement generally, or commonly, used. In any event this notice could not affect in any way the plain terms of the deed subsequently entered into by the predecessors in title of these Plaintiffs in Error.

The statement in the brief that this advertisement is "in further declaration of the nature of the estate" merely expresses the conclusion of Counsel.

(d) Although, in some cases, ordinances refer to these conveyances as leases, no ordinance providing for their sale used this word, or any word tantamount to it. The deed set forth on page 35 of the record under the heading "Deed for subdivision of a city lot under ordinance of February 27, 1851" is not the form of the deed used when these lots were sold. On the contrary, the one already alluded to is admitted to be the deed. It does not appear that this was the form when a subdivision was made. All that the record shows is that Plaintiffs in Error put in a deed which appears to have been made by the City on the 27th of February 1851 to Mr. Moses J. Solomons, but no showing was made as to

this deed being that generally used, and neither the Plaintiffs in Error, nor their holdings, were connected with it in any way.

(*e*) The validating act of December 21, 1823, set forth on page 31 of the Record, does not refer in any way to any agreement or contract with reference to the taxation or non-taxation of this class of property, or to the subject of taxation at all. It undertakes to confirm the conveyances made by the City, whether in fee simple or otherwise. The deeds commonly called the ground rent deeds did contain covenants and agreements, and hence the language of this act in so far as it may refer to them.

Plaintiffs in error simply assume that the act of 1825, mentioned on page 31 of the Record, authorizing the City to sell, either by lease for years or in fee simple, had reference to these lots as leased lots. The Record does not justify this inference. The City would sometimes really lease other property. Under their contention the Act of 1823 was unnecessary.

(*f*) We notice hereafter the meaning of the references in some of the Mayors' Reports, put in by Plaintiffs in Error, which mention this property as a part of the City domain.

Other facts that may be regarded by the Court as material are noticed hereafter in this brief.

PROPOSITIONS OF LAW.

We submit that no case is made in the Record for the cognizance of this Court, because no mention is made any where in the pleading of the Constitution of the United States. The contention is that the taxation of this property by the City of Savannah violates what is alleged to be a contract and is "unconstitutional," but, so far as we can discover, the Constitution of the United

States is not mentioned except in the writ of error.

Revised Statutes, §709.

Oxley Stave Co. vs. Butler Co., 163 U. S., 648, 653.

Kipley vs. Illinois, 170 U. S., 186, 187.

It is true that the Supreme Court of Georgia discusses the claim made by Plaintiffs in Error that this property is exempt from taxation by contract, the decisions of this Court bearing upon the right of a State to make such a contract and the necessity of showing an express contract, but the Federal Constitution is mentioned for the first time in the writ of error; and this is not sufficient.

Butler vs. Gage, 138 U. S. 52.

The bare averment of a Federal question is not sufficient to confer jurisdiction. In any event it must be plainly shown by Plaintiffs in Error that an express and valid contract of perpetual exemption from taxation was made, the obligation of which the municipal authorities, under legislative power, were endeavoring to impair.

New Orleans vs. New Orleans Waterworks Co. 142 U. S. 79.

The Supreme Court of Georgia has held in this case that there was no room whatever for the contention that a contract had been shown, even if the municipal authorities of Savannah had been clothed with the power to make a perpetual contract of exemption, and that the only one shown, that contained in the deed, which must govern, provided clearly and specifically for municipal taxation. (Pages 70 et seq. of the record.)

If this Court does not feel authorized to set aside this finding of the Supreme Court of Georgia on the proof submitted, it will not take any cognizance of this case.

Dibble vs. Billingham Bay Land Co. 163 U. S. 63.

N. O. Co. v. N. O. 143 U. S. 195

The foregoing general proposition is also incidentally involved in the contentions following :

No act of the Legislature of Georgia has ever been passed which refers to the taxation of this property, directly or indirectly, or which undertakes to confer upon the City of Savannah any specific authority with reference thereto. We claim not only that the power exists but that its exercise is mandatory. The power, however, comes from the broad and general language in our local law as to taxation.

Since the adoption of the first Code of Georgia, that which went into effect January 1, 1863, the taxing power of the City of Savannah is contained in the following provision: "They" (referring to the Mayor and Aldermen of the City) "are also hereby vested with full power and authority to make such assessments and lay such taxes on the inhabitants of said City and those who hold taxable property within the same, and those who transact or offer to transact business therein, as said corporate authorities may deem expedient for the safety, benefit, convenience and advantage of said City, and may enforce the payment of such assessments and taxes in such manner as said Mayor and Aldermen may prescribe. Besides real and personal property, the said Mayor and Aldermen may tax capital invested in said City, stocks in money corporations, choses in action, income and commissions derived from the pursuit of any profession, faculty, trade or calling, dividends, bank, insurance, express and other agencies, and all other property or sources of profit not expressly prohibited or exempt by State law, or competent authority of the United States."

Code of 1863, §4756; Code of 1882, §4847.

Under this broad grant of power the ordinance assailed in the case at bar has been passed. It clearly covers the taxation of this property, as much so as if it were specifically mentioned, no matter what may be thought of the character of the estate enjoyed by the holders.

No power in the City of Savannah to make the contract

There has never been in the City of Savannah, even prior to the adoption of the present Constitution, any power which authorizes the City to make ~~such~~ a contract of perpetual exemption from taxation.

No act of the Legislature of Georgia has been cited which shows, or suggests, its purpose to give this extraordinary power to the City of Savannah to barter away, perpetually, its right of taxation, to sell its very life-blood. In the absence of such legislative authority, the contract, if it had been made, would have been void. (Augusta Factory vs. City Council of Augusta, 83 Ga. 734. and the two cases cited therein with approval; Burroughs on Taxation, page 374; 1 Desty on Taxation, pages 127 and 129.) The case of Mack against Jones, 21 New Hamp.,* cited with approval in 83 Ga., is one where the property was conveyed by the city, and the grantor's deed contained an assurance of exemption from municipal taxation; and yet this contract was held to be void. See also N. O. Co. v. N. O. 143 U.S. 195

A void contract could, of course, not be ratified and confirmed, even if an effort of this character had ever been made, which is not shown.

California Bank vs. Kennedy, 167 U. S. 370, 371.

No authority can be cited which applies the principle of estoppel so as to deprive a State or city of the power of taxation by any means short of an express and direct contract upon sufficient consideration. It would be remarkable if a municipality were estopped as to this sovereign right by the declarations of a City Marshal, whether Aldermen were present or not. Those declarations, if made, amount to nothing more than a recognition of the fact of exemption, and were made, doubtless, because the property was then exempt *under and by virtue of the tax ordinances then in force.*

By reference to page 50 of the Record it will appear that some form of expression was always used in the

* Note. In Mack v. Jones, the paper was termed a "lease" and only the possession was conveyed.

tax ordinances, certainly from 1806, which in some way embodied the policy of the City of Savannah to exempt this class of property from municipal taxation. By reference to pages 8 and 9 of the brief for Plaintiffs in Error it appears that they admit this in terms. As stated on the latter page "in one form or another every tax ordinance admitted an exemption of leased lots or City lots from taxation." Prior to the adoption of the present Constitution the City of Savannah was not bound to tax all property, and could, *by ordinance*, exempt property from taxation, not as a matter of contract, but as a matter of municipal will, subject, of course, to the repeal of the ordinance at any time that the municipal authorities saw fit.

Waring vs. Savannah, 60 Ga., 93.

Augusta Factory vs. City Council, 83 Ga., 734.

But as held by the Supreme Court of Georgia when this case was before it on exceptions to the refusal of an interlocutory injunction, "whatever the expectation of purchasers or the unbroken practice of the City hitherto may have been, the mandate of the Constitution of 1877 is to tax all property save that expressly exempted by the Legislature under Constitutional authority, if any is taxed. That this mandate may have hitherto been disregarded is no reason why it should not be obeyed now."

Wells vs. Mayor and Aldermen of Savannah, 87 Ga., 401 and 402.

The passage of these ordinances from time to time, instead of strengthening the contention that a contract existed, suggests that it must have been understood that there was no contract upon which the exemption could be predicated, and that municipal legislation providing for the exemption of this class of property was essential to the accomplishment of this end.

The statements in the Mayor's reports merely recognize the fact of exemption. They were made to up-

hold the city's credit. There is not a word of evidence to show that they were intended to induce the purchase of this property. There is nothing to show that any one of these plaintiffs ever saw one of these reports before this litigation. A fair illustration of the purport of these reports can be found on page 51 of the Record, where the then Mayor—Mr. Screven—in making a statement as to the city's assets, includes these lots, but clearly at their value to the holders of the property. The city's claim, admittedly, would be extinguished by the payment of the balance of purchase money, which was comparatively small, and this was the city's real interest. While these lots were sometimes called "City Lots," it will not be disputed that at least a very large interest went out of the city and that the holders held, in any event, a perpetual lease, which they could sell, give away, devise, exercise absolute dominion over, and that they could at any time settle with the city by paying the balance of purchase money, which was frequently small.

The only reference outside of the deeds themselves in this entire record to a contract of exemption from taxation, express or implied, and the only scrap of evidence put in wherein words of this kind are used is to be found on page 56, and is contained in a report made January 17, 1872, wherein it is stated that "the reason why the City lots are not taxed beyond the ground rent is that the City is *understood* to have bound itself not to tax them * * * * It is of no moment that the stipulation does not appear in the deeds, the ordinances contain the real terms of the contracts and control the deeds, whenever the latter depart from or conflict with them. And as the City has never taxed such lots, it is difficult to resist the conclusion that such was the design when the ordinance of 1790 was framed."

If it were possible to bind a municipality perpetually by an estoppel on account of declarations of officers, in

any event it would be necessary for the Plaintiffs in Error to show that they in some way acted upon these assurances and that they did not afterwards, by accepting the deeds, surrender the rights that accrued to them under such assurances.

In this very case the Supreme Court of Georgia significantly says, after noticing that the effort to create a contract by such proof is simply an attempt to engraft upon a written instrument by parol a stipulation contrary to the terms of the writing itself: "Besides all this, we fail to find in the record any testimony showing that these particular plaintiffs, or any of their predecessors in title, bought any of the lots in question under the impression that the same would be exempt from taxes. Indeed, it is not shown that any of these lots were purchased at a sale at which the Marshal made such an announcement as that above referred to. The evidence simply goes to the extent of showing what was his custom in this particular, and what was the general impression of the public in regard to the matter. For aught that appears, those who actually bought at these sales were fully advised as to the truth with reference thereto, if not prior to the sale, at least before they complied with their bids and accepted the city's conveyance of the lots purchased by them." (Pages 71 and 72 of Record.)

The special attention of the Court is called to the fact that no one of these Plaintiffs in Error has testified in this case; that they offer no evidence at all as to when, or under what circumstances they bought the property held by them, or to suggest that when the Marshal sold *their property*, or any of it, any statement was made which could be invoked to raise an estoppel, much less an express contract. They claimed to be holders of the lots mentioned, and the answer admits that they are, but as to when they bought, from whom, under what

circumstances or under what impression, the proof is absolutely silent, although the answer asks for this information. (Page 13 of Record). There is nothing to indicate that any one of them ever saw this report on page 56, or any action of any kind by Council touching these lots, or ever heard of a statement made by a Marshal prior to this litigation. So far as the proof shows to the contrary, all of them may have purchased their lots after the passage by the City of Savannah of the ordinance of 1889, upon which the executions are based.

The oral testimony, to be found on pages 57 et seq. of the Record (most of which is clearly incompetent because it undertakes to vary the deed and to express opinions and conclusions) does not refer in any way to any property held by these Plaintiffs in Error, or connect any one of them with any of the matters referred to.

We submit that the Supreme Court of Georgia is clearly right in holding that there was not only an entire absence of evidence going to show that the City of Savannah ever contemplated making a contract of exemption, but that on the contrary the deed itself plainly and specifically reserves the right of taxation. (Pages 70 and 71 of the Record).

The parties to it agree that the property shall be subject to "*such assessments and burthens as shall be in common with other lot holders in the said City.*" This was put in *ex industria*, so as to avoid all questions on this point. (Page 20 of Record, latter part).

The covenant could not have been designed to provide that these holders should save the City from State and County taxes. At the time it was used, as fully appears in the Gibbons case hereinafter referred to (Charlton's Reports, page 113) the property of the City of Savannah was not subject to such taxation and never had been.

It has not been even since the adoption of the present Constitution.

Trustees vs. Bohler Tax Collector, 80 Ga., 163.

We do not lose sight of the fact that in 1856 the Legislature passed an Act providing that "from and after the passage of this Act the City of Savannah shall be exempt from taxation upon certain property known as the Springfield Plantation, now embraced within the corporate limits of said City." (Acts of 1855–6, page 546.) (These are the lots leased by the City of Savannah for a definite period of twenty-four years under the form of lease set out on pages 21 et seq. of the Record.) But this Act was unnecessary. The decisions of our Courts show that such property was exempt without the Act. As said by the Supreme Court of Georgia in the case of Savannah vs. Grayson, in noticing the point that the City could not be presumed to possess a power previous to the enactment of the Statute conferring it, "it not infrequently happens that a Statute is, in effect, simply declaratory of what was already existing law." (104 Ga., 115, 116).

Status of this property settled in Gibbons case

The Gibbons case dealt with lots eight and nine in Franklin Ward, and the status of the title to these lots. By reference to Exhibit A of the bill, on page 9 of the Record, it will appear that the Plaintiffs in Error, Charles M. and John H. Gilbert, are the owners of lot eight. In that case it is expressly recognized that if the title to these lots is in the City of Savannah they would not be subject to State and County taxation, and that the liability to such taxation turned upon the question as to whether the city was the landlord and the grantees only the city's tenants. The Court finds that if the grantees are the city's tenants, then this property cannot be subjected to either State or County taxation. In the report of a Committee of Council, put in evidence by Plaintiffs in Error, to be found on page 56 and already noticed, it is stated by the Committee that they "find it unneces-

sary to consider the nature of the estate vested in the purchaser of such a lot. *That subject seems to have been fully disposed of by a decision made in the Superior Court of Chatham County in January 1807, which, so far as your Committee are informed, has ever since been accepted as settling the law of the case.*" The decision referred to is that in the Gibbons case, which was decided at the January term 1807 of Chatham Superior Court, before the organization of the Supreme Court of the State, and, as already noticed, is to be found on pages 113 et seq. of the reports known as Charlton's Reports. In the light of this decision there could be no possible reason for the insertion of these words in order to settle the rights of the grantor and grantee so far as State and County taxation were concerned. The bulk of this character of property was sold by the city after this decision. The Plaintiffs in Error have, of course, purchased since. The greater part of that mentioned on Page 9 of the Record, (Exhibit A of the Bill) was sold by the city after this decision was made. (Further as to character of these holdings, see p. 15 et seq.

The Supreme Court of Georgia is clearly right in holding, as it does in this case, that the construction attempted is inconsistent with the writing. It would interpolate words which change the manifest meaning of the covenant. It is utterly opposed, too, to its accepted and continued construction. Plaintiffs in Error admit their liability for all other "burthens," but undertake to deny their liability for this, the main burthen.

The words are not only too broad to be restricted, as contended for by Plaintiffs in Error, but they have special reference to municipal taxation. They are a part of a covenant between the city and its grantee. The grantee, his heirs, executors, administrators and assigns are assured in this deed that as long as the ground rent is paid, the property shall be held and enjoyed perpetually "without the let, suit, trouble, eviction or denial of the corporation," but out of an abundance of caution

(although we submit the right of taxation would have been retained without the stipulation), the grantor (as it was supported by property *in* the city) stipulated that the lot holders should be subject to the assessments and burthens in common with other lot holders "in the said city," whose lots, because of their location, were subject to municipal burthens. The city, in its verified answer, states that when this covenant was first employed there were no assessments or burdens upon the lot holders of the City of Savannah, save only ordinary taxation, and that assessments for sidewalks and street improvements were of a much later day, and no effort was made to show the contrary of this. (Page 18 of Record.) This fact alone would make clear the meaning of the words when incorporated in the deed, if there is any obscurity about them.

At the time of their first use the City's enabling act, that which alone gave it authority to tax, employed the word "assessment" and did not use the word "tax." This is the Act of February 10, 1787, to be found in the Digest of Georgia laws commonly known as Watkins' Digest and on page 354. It is an "Act for better regulating the Town of Savannah and the Hamlet thereof," and in section 4 it is provided "That it shall and may be lawful for said wardens" (they were the predecessors of the present Mayor and Aldermen), "or a majority of them, yearly and every year or oftener, if occasion may require, to make, lay and *assess* one or more rate or rates, *assessment* or *assessments* upon all and every person or persons who do or shall inhabit, hold, use or occupy, possess or enjoy any lot, ground, house or place, building tenement or hereditaments in any square, street or place within the limits of the Town of Savannah or Hamlets as aforesaid, for raising such sum or sums of money as the said wardens, or a majority of them, shall, in their discretion, judge necessary for and towards carrying this Act into execution; and in case of refusal or neglect to pay such rate and assessment, the same

shall be levied," etc. This act was subsequently held to authorize a tax upon lots of ground or buildings within the city, or upon persons, with respect to this species of property by reason of their owning, occupying or inhabiting the same.

Savannah vs. Hartridge, 8 Ga., 27.

As stated by the Supreme Court of Georgia in this case, "the term assessment" is often used as a synonym of taxes. Indeed, one of the definitions of this term given by Webster is a tax. But even if this word, as used in the deed, does not necessarily refer to taxation, the word "burthen," which is therein employed, is certainly sufficiently comprehensive to include municipal taxes. Taken altogether, the language adopted is clearly broad enough to embrace every burden then existing, or which might thereafter be lawfully imposed upon other land owners in the city. The deed was signed by both parties. *Here, then, is a specific written agreement made between the parties to the contract relating to the sale of property by the city, whereby it is expressly declared that the property shall be held by the purchaser (and of course by his assigns), subject to any burden which might be borne in common by the holders of other lots in the city, necessarily including that of municipal taxation.* (Pages 70 and 71 of the Record.)

The word "assessment" has always been construed in Georgia to cover ordinary taxation.

See Frederick et al. vs. Augusta, 5 Ga. 561 (2).
Home Insurance Co. vs. Augusta, 50 Ga. 539.
Savannah, T. & I. of H. Ry. of Savannah vs. Mayor, &c., of Savannah, 37 S. E. R. page 394.

At the present time, when a distinction is sometimes made between ordinary taxation and what is generally called an assessment for street improvements, it is held that the former is made against the owner of the property and the latter against the property itself. As said by the Supreme Court of Georgia, in Hayden vs. City

of Atlanta, 70 Ga. 823, citing a large number of decisions from other States, "Taxes are imposed on the person, assessments are imposed on the property." In the case at bar the deed always used refers to the assessments and burthens of other "lot holders."

It would seem clear, therefore, even if a Marshal or other City Official, had been authorized to agree that the city would not tax this property and had so agreed in terms, undertaking to bind all the governing bodies of the City of Savannah, for all time to come, that when the purchaser subsequently became a party to this deed, with this covenant, he expressly surrendered whatever rights he might have had under this assurance from the official, and all claims thereafter made of exemption by contract would be in the very teeth of the writing. In the case of the Providence Bank vs. Billings, 4 Peters, 562–3; this Court, through Chief Justice Marshall say, of a claim of exemption from taxation, "we must look for the exemption in the language of the instrument, and if we do not find it there, it would be going very far to insert it by construction." Here we are asked not only to insert it by construction but much more than this, to change the words of the writing and vary it by a most unnatural and unreasonable construction for which no reason at all has been, or can be, given.

Since the use of the words just quoted from this Court all Courts have become more and more reluctant to recognize the contract set up even when expressed. They will certainly not make one for the parties., particularly against the terms of the express covenant.

The decision in Tucker vs. Ferguson, 22 Wall, 575, quoted by our Supreme Court in this case and followed (page 70 of the record), has never been varied or departed from.

Laws undertaking to exempt property for any definite time, or perpetually even, if originally valid, and they

had been shown in this case, do not, as a general proposition, tie up the hands of subsequent legislatures. They are usually mere bounty laws, subject to repeal at any time. They have been so held frequently when acted on and when investments have been made upon assurances clearly implied in them and when their repeal seemed to work a great injustice, if not involve bad faith.

See Christ Church of Philadelphia vs. City of Philadelphia, 24 Howard, 300.
Welch vs. Cook, 97 U. S., 541, 542, et seq.
Fertilizing Co. vs. Hyde Park, 97 U. S., 666.
Vicksburg Railroad Co. vs. Dennis, 116 U. S., 667, 668.

The case of Welch vs. Cook is a very strong one. The petition for injunction stated a very strong case for equitable relief. If a contract of exemption could ever be implied it ought to have been in that case. The judgment dismissing the case on demurrer was unanimously sustained.

A delay or failure to tax, no matter how long continued, cannot destroy or impair the right of taxation. This right is never lost by non-user or barred by prescription. (Railroad vs. Dennis, 116 U. S., 665; Wells against Savannah, 87 Ga., 401-2; the decision of the Supreme Court of Georgia, in this case, on page 71 of the record.)

Plaintiffs in Error allude in their brief to custom and usage. Even if they were right as to the facts, which we deny, (the record, we insisting, showing only that these holdings were exempt from municipal taxation because, and only because of ordinances which so provide), we need only say that no evidence as to usage, custom or anything else can add to, vary or contradict a writing. As said by this Court in National Bank vs. Burkhart, 100 U. S., 692: "A general usage may be proven in proper cases to remove ambiguities and uncertainties in a contract, or to annex incidents, but it

cannot destroy, contradict, or modify, what is otherwise manifest. Where the intent and meaning of the parties are clear, evidence of a usage to the contrary is irrelevant and unavailing. Usage cannot make a contract, where there is none, nor prevent the effect of the settled rules of law." In Tully vs. The County of Cook, 103 U. S., 162, it is said that "in all cases where evidence of usage is received, the rule must be taken with this qualification, that the evidence be not repugnant to or inconsistent with the contract."

We repeat, however, that we fail to find any evidence in the record of usage, custom or anything else which justifies the inference that the City of Savannah ever regarded this property as exempted by virtue of any contract or understanding.

If Hills in Error were lessees, they would be liable for taxes.

We submit that if the deed now before the Court were silent on the subject of taxation, this right would belong to the City, even if the City had been authorized to surrender it and the deed had characterized the lot holders as the City's tenant's, expressing in terms the purpose to create the relation of landlord and tenant. We do not think a case can be found which justifies the position that a landlord, as between himself and the tenant, must bear this burden, where the lease is longer than the probable life tenure, say for ninety-nine years. The tenant for life pays the taxes, although in ordinary tenancy, where the terms are within the probable duration of human life, the tenant does not do this. The reason for the rule applies with special force where the lease is for a longer term, and where the so-called tenant is, practically and substantially, the real owner of the property. As said by Mr. Taylor in his note to Section 341 of his work on Landlord and Tenant: "The rule applies only where the estate is for years. A tenant for life is bound for taxes and similar annual burdens." Here, the lot-holders hold admittedly not only for life,

but perpetually. They hold as long, as fully and as absolutely, as the ordinary owner in absolute fee simple, subject only to the claim of the City for the balance of the original purchase money, with the option in them to pay up the balance and thus stop the interest, but with no right in the City to require such payment.

In Davidson vs. Westchester Gas Light Co., 99 N. Y., 559, 568 and 569, the Court holds in terms that the usual incidents of landlord and tenant do not apply where the lessee is to all intents and purposes really the owner, "that the rule fails with its reason."

In Sanderson vs. the City of Scranton, 105 Penn. St. 469, 472 and 473, while the paper was designated by the parties to be a lease and used the terms appropriate thereto, and was, according to its literalism, a perpetual lease, the Court holds concerning the liability of the alleged lessee for taxes, as follows: "The liability of the owner of coal or mineral *in place* for taxes levied thereon results *from the nature of his estate or interest*, and, therefore, he is not relieved from responsibility on the principle *inclusio unius est exclusio alterius*, by an express covenant in the instrument of severance that he shall pay taxes levied on the coal *mined* without recourse to the lessor to refund the same." (Italics ours.) In this case it was held that the lessee was liable for the tax on the *unmined* coal, although it might, with reason, have been contended that by implication the conveyance released him from this. This case goes farther than it would be necessary for us to go, if the conveyance in the case at bar were silent as to assessments and burdens.

See Railroad vs. Sandison, 109 Penn. St. 583, which is to the same effect. Both of these cases are very much in point as to several features of the case at bar.

In Brainard vs. the town of Colechester, 31 Conn. 407, the Court holds that where a lease is made for nine hundred and ninety-nine years, the alleged lessee holds practically, for all substantial purposes, a conveyance in absolute fee simple. To same effect, see Wells v. Savannah, 87 Ga., 399, 400, and some of the citations on page 19 of this brief.

Under the Constitution of the State of Georgia it is the duty of the municipal authorities of Savannah to tax all property except that exempt by the Constitution. These exemptions are strictly construed, and the mandate of the fundamental law applies as completely to municipalities as it does to the Legislature of the State.

See the provisions of the Constitution of the State of Georgia to be found in Sections 5084 and 5086 of the present Code of Georgia, commonly known as the code of 1895;
Wells, et al. vs. Savannah, 87, Ga., 401–402.
McLendon vs. LaGrange, 107, Ga., 356.

The power of the City of Savannah is very broad. It is found in Section 4847 of the Code of 1882. Its fullness is noticed by the Supreme Court of Georgia in Savannah vs. Crawford & Lovell, 75 Ga., 35 and 38, (which deals with the defense of an exemption by contract,) and in the recent case of the Street Railroad Co. vs. Savannah, 37, S. E. R. page 393.

In November 1889, just a month before the passage of the ordinance now before the Court, the Legislature of Georgia passed an act which was merely declaratory of the law as it was previous to its passage. It provides "that all persons owning any mineral or timber interests or any other interest or claim in or to lands *less than the fee* shall be and they are hereby required to return the same for taxation, and to pay taxes on the same *as on other property.*" (Georgia Laws for 1889, p. 35.) It is found in the first volume of the present Code of Georgia, Section 768.

The Supreme Court of Georgia was clearly right in holding as it did, when this case between these parties was before it on exceptions to the refusal of an inter-

locutory injunction, that the property of these Plaintiffs in Error was subject to municipal taxation whether they hold the fee or under perpetual lease. We do not see any escape from the conclusions and the reasoning of the Supreme Court of Georgia, as announced by Mr Chief Justice Bleckley, on pages 398 et seq. of 87 Ga. The Court found nothing debatable about the question. It seemed too plain for argument. It even wondered how learned and astute counsel could raise the question.

The bill of these Plaintiffs in Error in this case does not in any way put in issue the statement in the City's answer to the effect that the property is justly and clearly assessed for taxation, *held as it is.* They claim only that the municipal authorities have "caused the said lots of your petitioners to be assessed at a valuation greatly in excess of the valuation money mentioned *in the original conveyance of lease,*" (page 6 of the Record), but they do not allege, or attempt in any way to show, that the assessment is in any case in excess of what they could now sell out for, the purchaser stepping into their shoes, acquiring all their rights and assuming their obligation. Why then is not this property clearly subject to taxation, even if the estate enjoyed be less, only a leasehold interest? They call it in the Bill "a perpetual lease." (Page 3 of Record.) Under the authorities cited, the lessees of such leases are practically and substantially the owners of the property, and are subject to all the burdens of owners, including the payment of taxes.

It is, of course, not necessary that a man have any title to property in order to be obliged to pay its taxes. The possession of lands under a bond for titles, although no part of the purchase money be paid, involves responsibility for its taxation, and, as between the party in possession and his obligor, the former is the proper one to pay. See National Bank of Athens vs. Danforth, 80 Ga., 64.

+ Not even the Ga. Courts could look into the question of valuation even if it were raised. Augusta v. Pierce, 79 Ga. 78.

The fact that the interest may be purchased from the City is immaterial. A State or municipality may sell land, or any interest in it, for cash, or on time, and the property purchased is just as subject to taxation as if it had been bought from some third party. The fact that all the purchase money is not paid is of no consequence. Suppose the City should sell any property to A on time, either with or without a part payment of the purchase money, and suppose A were to take a deed and the City a purchase money mortgage, it would not be claimed that A was not subject to municipal taxation on this property. In the case at bar it will be conceded that as soon as the balance of the purchase money (which in many cases of these lots, now very valuable, is very small) is paid, the lots involved become immediately taxable by the City. (Robertson vs. Land Commissioner, 44 Mich., 275 and 276;* The Hudson Tunnel Co. vs. The Board of Riparian Commissioners, 27 N. J., Eq. 573.)

Plaintiffs in Error are not Lessees

In view of the fact that no question is made by the pleading or the proof as to the justice of the valuations placed upon these holdings for taxation, and this matter would not be considered by this Court in any event, we apprehend that the Court will not go into this question. As Plaintiffs in Error seem to think that the character of the title bears upon their main contention as to contractual rights, we proceed to submit that the deed conveyed a freehold of inheritance, to be defeated upon the non-performance of a condition subsequent. The brief of Mr. Attorney General Charlton in the Gibbons case seem to be conclusive. The report of the decision of the Court on page 121 of Charlton's Reports states "That the Judge in his charge to the special jury repeated the law as it had been cited by Mr. Attorney General and then left it to the jury, according to the judicial system, to determine whether Mr. Thomas Gib-

* Judge Cooley's remarks in 44 Mich. 275, are very apposite

bons was the lessee of the corporation or whether the deed did not create a freehold estate of inheritance. If the latter estate was created, the lots were certainly subject to the State taxation."

In addition to the authorities cited in ~~this~~ the brief in the the Gibbons case, the Court, should it find it necessary to consider this question, is referred to the following authorities:

2 Blackstone's Coms. M. P.'s 105, 106, 109, 110; 139 et seq.; 4 Kent's Coms. M. P.'s 5, 6 and 9; Irwin vs. Banks, 1 Penn. St. R. (Barr) 349; Krider vs. Lafferty, 1 Wharton (Penn.) 303(5), 314, 315; Sahl vs. Wright's Exrs., 6 Pa. St. (Barr) 433; Sanderson vs. the City of Scranton, 105 Pa. St. 469, 472-3; R. R. Co. vs. Sanderson, 109 Pa. St. 583; Saunders vs. Hanes, 44 N. Y. (5 Hand) 353-4, 358 et seq; Carter vs. Burr, 39 Barbour 59, 65; St. Paul's Church in Syracuse vs. Ford, et al., 34 Barb. 16; Davidson vs. Westchester Gas Light Co., 99 N. Y. 559-60, 568-9; Bridge vs. Wellington, 1 Mass. 219; 9 Allen 159 and 167; Feofees of the Grammar School in Ipswick vs. Andrews, 8 Metc. 584; Alexander vs. Warrand, 17 Mo. (2 Bennett) 228; McMurphey vs. Minot, 4 N. H. 254; Cole vs. Lake Co., 54 N. H., 242-3, 277; Farley vs. Craig, 11 N.J.L. (6 Halsted) 312; School District of Delhi vs. Everett, 52 Mich. 314, 317; Guy Arms vs. Burt, et al., 1 Vt. 303; Stevens vs. Dewing, 2 Vt. 411; R. R. vs. State, 60 N. H. 139; Brainard vs. the Town of Colechester, 31 Conn. 407; Cinn. College vs. Yeatman, 30 Ohio St. 286 with 277 and 8; Hudson Tunnell Co. vs. Board of Riparian Comrs., 27 N. J. Eq. (XII. C. E. Green) 573; Taylor's Landlord and Tenant, Sections 14 et seq. and 50 in connection with Sections 74, 470; Wood's Land. & Tenant, p. 106, Section 75; McAdam on Land and Tenant, 48.

Plaintiffs in Error say that the words "heirs" is not used in the *habendum* clause of this deed, and that be-

fore the act of 1821, the use of this word was necessary to the conveyance of a fee. They contend that Attorney General Charlton was in error when he stated in the Gibbons case that the "deed conveys an estate to him, his heirs and assigns, forever." In reply we submit that no authority can be produced to support the proposition that it has ever been necessary in Georgia that the *habendum* clause of a deed should contain this word, and that the Attorney General nowhere says that the *habendum* clause of this paper has this word. The fact is that the word "heirs" appears four times in the paper and it is connected with provisions looking to the enjoyment of the estate by heirs. Their enjoyment of the property is as completely provided for in the deed as is that of the grantee himself. As said in the Gibbons case "upon the demise of the ancestor the heirs take possession of the lots, by the legal operation of the deed." Some of the authorities cited by us show that the location of the words in the paper is not material. See e. g. 4 Kent's, Coms. 5 and 6; Bridge vs. Wellington, 1 Mass. 219; Saunders vs. Hanes, 44 N. Y., 358 et seq. In the last case the dissenting judge thought that the word ought to be in some way connected with a provision that the heirs may enjoy the estate granted. The deed in the case at bar fully meets this requirement. In some of the cases cited by us, while the point as to the location of the word "heirs" may not be discussed, it is held that a fee is conveyed and, yet, in point of fact, the word, heirs, is not used. The cases which hold that the word must be used recognize that the location of the word is not material. There is strong authority for the position that the rule as to the use of this word, being a feudal one, never had any application to this country. See Cole vs. Lake Company, 54 N. H. 242-3; 277 et seq.

The case of Atkinson vs. Orr, 83 Ga., 34, does not militate in any way against our construction of the deed. It merely adjudicates the rights of the parties

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under the contract before the Court. The character of the estate created was not involved. The question was as to the rights of the parties under the writing, whatever its name. The paper, too, was essentially different from that now before the Court.

Besides, many of these deeds, probably a large majority of them, have been executed by the City of Savannah since the Act of 1821, and are governed by it. According to their pleading, this is true of a majority of those specifically involved in this case. (Page 9 of the Record.) Under this Act "the word "heirs" or its equivalent is not necessary to create an absolute estate; but every conveyance properly executed shall be construed to convey a fee unless a less estate is mentioned and limited in such conveyance." (Code of Ga., Sec. 3083.)

The decisions of the Supreme Court of Georgia, arising before the taxation of this property, in Swoll vs. Oliver, 61 Ga., 248, and Laurence vs. Mayor and Aldermen of Savannah, 71 Ga., 392, fully harmonize with our contention, and their expressions sustain it, although the question of taxation of this property was not involved. In the former case, this Court recognizes, in terms, that "until re-entry the *title* was in the purchaser; that this was necessary in order to *re-invest* the City with the title," and that, therefore, before this, the title was out of the City. (61 Ga., 248, 253.) The adjudication in the Laurence case is entirely inconsistent with the idea that the City was only the landlord, because it holds that, notwithstanding the re entry, under the terms of the deed and the provision that "the estate created was determined to all intents and purposes as fully as if the same had not been bargained for or purchased," the City could re-enter only for the purpose of selling, in order to recover what might be due the City, the exact adjudication being in the following words: "The right of re-entry and re-sale was for the *purpose of securing*

the amount due the City, and after the payment of this the holder under the original grantee had an equitable claim to the balance, and a bill for the purpose of enforcing such claim was not demurrable." (Italics ours.) When a landlord lawfully re-enters upon his property, the rights of the tenant cease, either in the property or the proceeds of its subsequent sale. Under the decision in the Laurence case, the City's possession is substantially that of a vendor who holds a purchase money mortgage to secure a balance of purchase money, with power to sell upon default, the City can re-enter only for the purpose of collecting its debt, and the excess goes to the original purchaser or his assigns. The Court, through Judge Hall, calls the City's grantee the *feofee* thus showing his appreciation of his status. Both cases contain expressions showing clearly that the Supreme Court of Georgia understood that the title had passed out of the City. In the Laurence case the Court properly say (71 Ga., 396): "In Swoll vs. Oliver, 61 Ga., 248, this Court determined that 'where the City, by its proper officer, posted a notice of re-entry on the lot according to the terms of the deed, such act would constitute a re-entry thereon, and after the expiration of ten days would defeat the title of the purchaser.'" (Wells v. Savannah 87 Ga. 401.)

There is nothing said in the ordinances providing for sales of property on this plan about a lease. Such ordinances do not anywhere call these papers leases. The lots are to be "sold;" the highest bidder "Shall be deemed the purchaser of the lot then under sale;" it is to be "in the power of such purchasers, or their heirs and assigns, to pay in the said valuation money;" "a deed by way of bargain and sale is to be made," and then the ordinance provides as follows, (page 29 of the Record): "And the said bargain and sale shall vest either an absolute or conditional estate in the purchaser according to circumstances; that is to say, an absolute

one if the valuation money shall be paid down, or a conditional one if the said valuation money shall not be paid down, this latter also to become absolute if, and when said-valuation money shall at any future time be paid into the treasury and an acknowledgement thereof under the seal of the City, signed by the Mayor and a majority of the Aldermen for the time being, and attested by the City Treasurer, shall be endorsed on such deed." It is true that immediately after this appear the words "use and occupation" stressed by Plaintiffs in Error, but they cannot have any special significance in view of their context; they certainly cannot control the meaning of the entire ordinance, or the deed subsequently entered into by the parties. Immediately after them, the ordinance provides that upon a failure by a purchaser, or those claiming under him to pay groundrent for fifteen days, "the said premises are to *revert* to the corporation, who shall immediately thereafter possess the power of re-entry, and having, by means of their proper officer, exercised such power and given a proper notice thereof in writing posted on the premises, the lot or lots so entered upon, with all improvements thereon, are to be considered at the expiration of ten days thereafter as absolutely *revested* in the corporation," etc.

It is not denied that in point of fact the purchasers of these lots, and their heirs and assigns, have always had (subject to the City's right to what is called ground rent and its remedy for its collection) the absolute and complete use, occupation, enjoyment and control of this property, with as ample and complete dominion over it as could be incident to any property held in absolute fee simple. This is the necessary legal effect, as well as the practical and universal construction of the effect of these deeds, and the words "use and occupation" have not impaired or affected this practical result and were not so designed. The ordinance in its entirety, as does the

deed, shows that the purchaser's rights were not to be confined to a mere use and occupation (although, of course, he had these completely, just as the owner of a fee simple estate has) but were to include a full and complete ownership and dominion over the property, subject to the City's claim, which is, we repeat, substantially that of a vendor who holds a purchase money mortgage, vesting in him the right to sell upon default at public outcry for the purpose of collecting his claim, a right frequently given in mortgages.

While the interest on the purchase money withheld is called a "ground rent," it is really and necessarily interest. As said by Mr. Bouvier in his Law Dictionary "rent is a return or compensation for the possession of some corporeal inheritance, and is a certain profit, either in money, provisions, or labor, issuing out of lands and tenements, in return for their use." Prof. Minor, in the second volume of his Institutes, page 34, declares that "compensation for the land that passes is the crowning characteristic of a proper rent." In the case at bar the plan in substance was to sell the lots upon a minimum price to the party or parties that bid the highest increase money, and the purchaser had the option to pay in full, or to pay a part of the purchase money and hold the balance at a rate of interest fixed in the different ordinances, generally five or six per cent. This per cent, called frequently "ground rent" was the compensation paid by the debtor to his creditor in recompense for a detention of the debt. The amount to be paid was not dependent in any way upon the value of the holding, or its rental value, or upon the value of its use and occupation, but entirely upon the amount of purchase money withheld. If, for example, the lot sold originally for $500 and the purchaser paid $100, held the balance upon an agreement to pay the city for the use of this balance

at a rate of five per cent. per annum on $400, and the lot should afterwards become extremely valuable, worth $50,000 or more, and its rental value be worth a good many thousand dollars a year to the holder, he would not pay the city more than this interest on $400, or $20 a year in four quarterly payments.

There is evidence in the Record to suggest that this plan, when the population of the City and its needs were very small, was a favored one, and that the City preferred to have a part of the purchase money held under this plan and thus establish a permanent fund for the support of the Government. It preferred doubtless that the holders should not pay up this balance and thus stop the interest on the money. This may be the reason why the yearly tax ordinances provided that the property should not be taxed.

In point of fact, some of the city's ordinances designated this alleged ground rent as interest. There is one, for example, passed in Council March 13, 1851, and to be found on pages 117 and 118 of a Digest of the Ordinances of the City of Savannah, commonly called Henry's Digest. The body of it shows that it provided for the sales of the lots in LaFayette and Troup wards, forming these wards out of the domain to be sold under this ordinance. It provides for the sale under the general plan pursued, and Section 3 of the Ordinance provides as follows: "That the said lots, the laying off whereof is above provided for, to be valued and sold in the usual manner, under the direction of the Committee on Public Sales and City Lots, at such time or times as to said Committee shall appear expedient and proper; the terms of sale to be twenty (20) per cent. cash on the aggregate of valuation and increase money, and *interest* on the balance of purchase money, to be payable quarterly at the city treasury at the rate of six per cent. per annum, with the privilege to the purchaser, his or her

heirs, executors, or administrators or assigns of paying into the treasury the balance remaining unpaid of the purchase money and all *interest* due thereon up to the time of said payment, receiving after such payment a fee simple title." By reference to Exhibit "A," on page 9 of the Record, it will appear that three of the ten Plaintiffs in Error in the case at bar now own lots sold by the city under this ordinance. Mr. Wells appears to own lot 37, LaFayette Ward, sold by the city April 22, 1851, and 30 Troup Ward, sold November 10, 1851; that Mr. Blun owns 10 Troup Ward, sold by the city March 5, 1853, and that Mrs. Douglass owns a part of lot 40, LaFayette Ward, sold by the city April 24, 1853. Another Ordinance, to be found on pages 137 and 138, is to the same effect, using the word interest instead of ground rent. We are aware that defendants introduced no evidence; but, under the charter of the City of Savannah, as recognized by our Supreme Court, judicial cognizance is taken of our ordinances, just if as they were acts of the Legislature. Code of 1882 Sec. 4872,

Collins vs. Russell, 107 Ga. 432. (Middle of page).

Our Supreme Court could consider these ordinances, whether in the record or not. See also those cited on p. 7 of Reply Brief of Plffs in Error.

The Springfield Plantation lots, held under the form of lease set out on pages 21 et seq. of the Record, are not involved in this case. They were leases for twenty-four years, that is, for a definite term. The language employed to convey the interest is "have demised, let and to farm let and by these presence do demise, let and to farm let unto the said.....his heirs, executors, administrators and assigns."

The form of the deed conveying the property involved in the case at bar uses the words "have bargained and sold and by these presents do bargain and sell," etc. These Springfield Plantation leases omit also the words

"subject only to such assessments and burthens as shall be in common with other lot holders in the said city."

We do not notice specifically the authorities cited in the brief of Plaintiffs in Error. So far as we can discover, they do not deal with the question now before the Court. Many of them do not touch the question of taxation at all. Some deal with exemptions in charters, which, ordinarily, raise this question. We do not think a single case can be found where the doctrine of estoppel has been applied to prevent the taxation of property or where a contract of exemption has ever been implied. In all cases, where the power to exempt existed, a plain and manifest contract had to be proven, based upon sufficient consideration, and its terms had to be free from all reasonable doubt.

Respectfully submitted,

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